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RE TEH SIEW FAH; EX P PERWIRA HABIB BANK MALAYSIA BHD

HIGH COURT MALAYA, KUALA LUMPUR
MARY LIM JC
B [BANKRUPTCY CASE NO: 43-154-1986]
26 MARCH 2009

BANKRUPTCY: *Receiving and adjudicating orders - Setting aside - Application for - Whether bankruptcy notice a nullity ab initio - Delay of 20 years in making application - Whether immaterial - Whether creditor prejudiced*

C

BANKRUPTCY: *Bankruptcy notice - Validity - Amount in notice not yet due and payable - Whether a fatal flaw - Whether notice invalid and a nullity ab initio*

D

Madam Teh Siew Fah was adjudged a bankrupt on 8 June 1987 for not paying the sum of RM157,442.10 stipulated in the bankruptcy notice dated 10 January 1986. That sum comprising of RM138,891.10 together with interest at 14% per annum
E calculated on a daily basis from 13 February 1984 to 21 January 1986 were the terms of a final judgment in a liquidated claim brought by Perwira Habib Bank Malaysia Berhad and granted against her when she defaulted in appearance on 5 August 1985. However, Madam Teh only discovered she had been made a
F bankrupt when she applied for her international passport at the Immigration Office some time in 2007, about 20 years later. Subsequently, she applied for the adjudicating and receiving orders granted to be set aside on the basis that the bankruptcy notice was invalid and a nullity. The senior assistant registrar dismissed
G the application. On appeal before this court, the issues that arose were (i) whether the bankruptcy notice was invalid and a nullity *ab initio* and (ii) whether the delay of some 20 years in making this application deny Madam Teh the relief sought.

H **Held:**

(1) The creditor had calculated and claimed interest beyond the date that was permitted under the law; up to 21 January 1986 when the bankruptcy notice was dated 10 January 1986. The amount mentioned in the body of the notice therefore clearly
I contained an amount which was not yet due and payable by Madam Teh, the debtor. The sum representing the element of

interest was for a period which had not even arose at the date of issue of the bankruptcy notice. It was wrong to include that part of the interest in the body of the bankruptcy notice. That was the fatal flaw. The bankruptcy notice was therefore a nullity *ab initio*. (para 12)

(2) The delay of 20 years was immaterial as it had been reasonably accounted for and there was no prejudice to the creditor. For the last 20 odd years, other than a proof of debt in 1987, the creditor had not done anything. Neither had the Insolvency Office. Based on the above reasons, the adjudicating order and receiving order were hereby rescinded. (para 14)

[Order accordingly.]

Case(s) referred to:

Fawzia Osman v. Bank Bumiputra (M) Bhd [1991] 1 CLJ 652; [1991] 1 CLJ (Rep) 113 SC ***(refd)***

Ghazali Mat Noor v. Southern Bank Bhd & Anor [1989] 2 CLJ 380; [1989] 1 CLJ (Rep) 35 SC ***(refd)***

In Re Chinery [1884] 12 QBD 342 ***(refd)***

Lim Boon Peng v. United Orient Leasing Company Bhd [1991] 1 CLJ 445; [1991] 1 CLJ (Rep) 270 SC ***(refd)***

Low Mun v. Chung Khiaw Bank Ltd [1987] 2 CLJ 400; [1987] CLJ (Rep) 172 SC ***(refd)***

Malayan Banking Bhd v. Datuk Lim Kheng Khim [1991] 1 CLJ

Re Ismail Daud & Anor, ex p Universal Life & General Insurance Sdn Bhd [1989] 2 CLJ 1043; [1989] 1 CLJ (Rep) 617 HC ***(refd)***

Re Mohamad Fadzimi Yaakub, Ex p United Malayan Banking Corp Bhd [1998] 1 CLJ 783 HC ***(refd)***

Re Seow Yin Fong; Ex parte: United Orient Leasing Company Berhad & Another Case [1994] 2 CLJ 845 HC ***(refd)***

Legislation referred to:

Bankruptcy Act 1967, s. 3(1)(i), (2)

Bankruptcy Rules 1969, r. 91

For the judgment creditor - Clement Wong; M/s Raja, Darryl & Loh
For the judgment debtor - KK Lai; M/s KK Lai & Co

Reported by Suhainah Wahiduddin

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JUDGMENT

Mary Lim JC:

[1] Madam Teh Siew Fah was adjudged a bankrupt on 8 June 1987. This was because she had not paid the sum of RM157,442.10 stipulated in the bankruptcy notice dated 10 January 1986. That sum comprising of RM138,891.10 together with interest at 14% per annum calculated on a daily basis from 13 February 1984 to 21 January 1986 were the terms of a final judgment in a liquidated claim brought by Perwira Habib Bank Malaysia Berhad and granted against her when she defaulted in appearance on 5 August 1985.

[2] Madam Teh only found out she had been made a bankrupt when she applied for her international passport at the immigration office some time in 2007, about 20 years later. She then engaged lawyers who applied for the adjudicating and receiving orders granted on 8 June 1987 to be set aside on the basis that the bankruptcy notice dated 10 January 1986 was invalid and a nullity.

[3] The application was opposed by the Creditor Perwira Habib Bank Malaysia Berhad now known as Affin Bank Berhad on several grounds. After hearing parties, including a representative from the insolvency office the learned Senior Assistant Registrar dismissed the application on 5 May 2008.

[4] On appeal before me the issue is whether the bankruptcy notice dated 10 January 1986 is invalid and a nullity *ab initio*. If so, does the delay of some 20 years in making this application deny Madam Teh the relief sought?

[5] Some preliminary objections were taken at the outset of submissions but these were quickly abandoned. The focus rightly by learned counsel was then on the substantive issues just identified.

[6] Since the late '80s the purport and application of s. 3(1)(i) Bankruptcy Act 1967 have been clarified. Where a debtor has not paid "the judgment debt or sum ordered to be paid in accordance with the terms of the judgment or order" he can be said as having committed an act of bankruptcy.

[7] Each decision of the highest court in the land has consistently reminded that because of the serious implications of bankruptcy proceedings in that "commission of an act of bankruptcy entails disabilities to the person who commits it" s. 3(1)(i) is given a strict construction - see *Low Mun v. Chung Khiaw Bank Ltd* [1987] 2 CLJ 400; [1987] CLJ (Rep) 172 @ 175, quoting Bowen LJ *In Re Chinery* [1884] 12 QBD 342 @ 346. The additional reason would be as stated by Mohd Azmi SCJ in Low Mun: "As to the principle for construing bankruptcy notices, we agree with the view that since bankruptcy is entirely a creation of statute law, the rule of strict construction should be applied to the legislative words creating the act of bankruptcy".

[8] That being so, the debtor is entitled to know with exactness the amount of debt owed or due and payable at the date of issue of the notice or at any earlier fixed date. Hence if the judgment debt includes the elements of interest and costs, and judgment debts invariably do, the sum representing these items must be precisely calculated and incorporated into the bankruptcy notice. Should the debtor choose for any reason not to pay that amount, then rightly it can be said that the debtor has committed an act of bankruptcy.

[9] I agree with the view expressed by Justice VC George in *Re Ismail Daud & Anor, ex p Universal Life & General Insurance Sdn Bhd* [1989] 2 CLJ 1043; [1989] 1 CLJ (Rep) 617 that the amount, once precisely calculated must be stated in the body of the bankruptcy notice. That notice must adhere to Form 5, the statutory form prescribed under r. 91 of the Bankruptcy Rules 1969. Form 5 does not require particulars or details as to how the debt is calculated to be set out. That being so any errors in that part of the notice may rightly be disregarded. I believe such particulars are really information offered by the creditor to assist the debtor in understanding how the total debt is arrived at.

[10] Once information is provided by way of those particulars obviously the information can be considered by the court. In this case, it appears that the creditor has calculated and claimed interest beyond the date that is permitted under the law; up to 21 January 1986 when the bankruptcy notice is dated 10 January 1986. The amount mentioned in the body of the notice therefore clearly contains an amount which is not yet due and payable by Madam Teh, the debtor. While it is acknowledged that there are practical problems encountered when stipulating the amount

representing interest, the position in law is clear: only the amount of interest already due and payable at the date of issue of notice or calculated to an earlier date which has been fixed must be quantified and set out in the body of the bankruptcy notice. In *Ghazali Mat Noor v. Southern Bank Bhd & Anor* [1989] 2 CLJ 380; [1989] 1 CLJ (Rep) 35 the Supreme Court held that "For a bankruptcy notice to be valid, therefore, it should state the exact amount due as at the date of the bankruptcy notice. He does not have to make any calculations or enquiries." In *Fawzia Osman v. Bank Bumiputra (M) Bhd* [1991] 1 CLJ 652; [1991] 1 CLJ (Rep) 113 SC citing Low Mun and *Lim Boon Peng v. United Orient Leasing Company Bhd* [1991] 1 CLJ 445; [1991] 1 CLJ (Rep) 270 Mohd Azmi SCJ stated: "... it is wrong to include interest in the notice any sum which is not due and payable by the debtor as at the date of the issue of the notice." To include such an amount cannot be said to the requiring the debtor to pay an amount "in accordance with the terms of the judgment or order" as provided under s. 3(1)(i).

[11] The inclusion of the interest is quite different from the claim of an amount already paid but claimed again as was the case in *Malayan Banking Bhd v. Datuk Lim Kheng Khim* [1991] 1 CLJ 270 where s. 3(2) Bankruptcy Act was raised.

[12] In the facts of this case, the sum representing the element of interest is for a period which has not even arisen at the date of issue of the bankruptcy notice. The interest is not even due. It is obviously not yet payable. It is wrong to include that part of the interest in the body of the bankruptcy notice. That is the fatal flaw. The bankruptcy notice is therefore a nullity *ab initio*.

[13] Recognising the practical problems presented, s. 3(1)(i) was amended *vide* PU(A) A827/1992. The provision now clearly states that the amount representing interest must only be the amount "quantified up to date of notice". This amendment merely enacts into statute law the position as interpreted and applied consistently by the courts as can be seen in the cases cited earlier. No new law was introduced.

[14] The next issue concerns the delay in making this application. To me, the delay of 20 years is immaterial as it has been reasonably accounted for. More important, there is no prejudice to the creditor unlike the position in the two cases cited by learned counsel for the creditor. In *Re Seow Yin Fong; Ex parte: United Orient Leasing Company Berhad & Another Case* [1994] 2 CLJ 845

and *Re Mohamad Fadzimi Yaakub, Ex p United Malayan Banking Corp Bhd* [1998] 1 CLJ 783 the High Court in both cases refused to exercise its direction to rescind the adjudication and receiving orders. Delay was either not explained or more importantly, the matter of prejudice caused to the creditors was weighed against the debtor. Here, for the last 20 odd years, other than a proof of debt filed in 1987 the creditor has not done anything. Neither has the insolvency office. Its representative has informed the court that it is leaving it up to the court to decide on the matter.

[15] Based on the above reasons the bankruptcy notice issued on 10 January 1986 is therefore invalid and a nullity *ab initio*. The adjudicating order and receiving order both dated 8 June 1987 are hereby rescinded with no order as to costs.